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**IN THE SUPREME COURT  
STATE OF ARIZONA**

PETITION TO ADD NEW RULE 47.3  
CONCERNING CHILD REMOVAL TO  
THE RULES OF PROCEDURE FOR THE  
JUVENILE COURT

Supreme Court No. R-17-0046

**Comment of the Arizona Public Defender  
Association in Response to the  
Administrative Office of the Courts'  
Request to Add Rule 47.3**

Pursuant to Rule 28, Arizona Rules of the Supreme Court, the Arizona Public Defender Association (APDA) submits its Comment regarding the Petition to Add New Rule 47.3 Concerning Child Removal to the [Arizona] Rules of Procedure for Juvenile Court filed by David K. Byers, Director of the Administrative Office of the Courts, Arizona Supreme Court, R-17-0046. The APDA is an Arizona non-profit corporation comprised of public defense offices and programs throughout the State of Arizona. The primary purposes of our organization include improving the quality of legal representation of indigent people who face the loss of liberty or the right to parent and ensuring a just legal system. Our offices defend the overwhelming majority of individuals who are involved in a Title 8 dependency, guardianship or severance.

1           The proposed addition of Rule 47.3 to the Arizona Rules of Procedure for  
2           Juvenile Court was requested by the Administrative Office of the Courts for the Arizona  
3           Supreme Court to “provide[] a due process and 4<sup>th</sup> Amendment compliant procedure for  
4           the Department” of Child Safety (DCS) and others to “search for a child” and to seize a  
5           child from his or her parents. The petition indicates it was circulated for comments prior  
6           to its filing; however, the proposed language was provided on August 28, 2017, and  
7           comments were due a mere four days later on September 1, 2017. This issue of seizure  
8           of children without a court order is not new and has been the subject of litigation and  
9           debate for at least the last 1.5 years. Parents’ and children’s attorneys were not included  
10          in the original drafting of the proposed rule and then were only provided a meager four  
11          days to review the proposal and provide substantive and meaningful comment. Further,  
12          the Court has been asked to review the issue on an expedited basis and a window of  
13          only seven weeks for comments is provided, as opposed to the normal five months for  
14          thoughtful and substantive commentary. The request to add Rule 47.3 to the Rules of  
15          Juvenile Court should be denied as currently constituted and, instead, should be adopted  
16          with the changes suggested below. *See* Appendix A.

21           Recognizing the significant limits of the new A.R.S. § 8-821(A) and the need to  
22           create juvenile court -procedures for the issuance of warrants to enable DCS and law  
23           enforcement officers to search for and seize children from their parents in demonstrated  
24           abusive situations, APDA agrees that a new rule is necessary to provide procedures to  
25           protect the Due Process, Fourth Amendment and privacy rights of parents and children,  
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1 to prevent children from suffering the irreparable injury of unnecessary seizures, and to  
2 provide direction to DCS and law enforcement on the necessary procedures.

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4 The ability to parent one's children is a fundamental right to which we as  
5 Americans and Arizonans enjoy. Before the State is permitted to interfere with one's  
6 fundamental right to parent, parents are entitled to Due Process. The United States and  
7 Arizona Constitutions provide well-established protections for the right to privacy,  
8 including the right to be free from unreasonable searches and seizures, as well as due  
9 process protections to prevent irreparable harm by the government to citizens. U.S.  
10 Const. amends. IV, XIV; Ariz. Const. art. II, §§ 4, 8. It is well settled within the United  
11 States Court of Appeals for the Ninth Circuit that "officials may seize a child without a  
12 warrant if the information they possess at the time of the seizure is such as provides  
13 reasonable cause to believe that the child is in imminent danger of serious bodily injury  
14 and that the scope of the intrusion is reasonably necessary to avert that specific injury[;  
15 and that b]ottle rot, malnourishment, and disorderly home conditions do not present an  
16 imminent risk of serious bodily harm." *Kirkpatrick v. Cty. Of Washoe*, 843 F.3d 784,  
17 788-91 (9th Cir. 2016) (internal citations and quotations omitted). Thus, under both  
18 federal and Arizona constitutional law, removal of children from their parents without a  
19 warrant, or exigent circumstances, and absent due process protections is prohibited.  
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23 The Proposed Rule 47.3 language fails to provide due process protections, as  
24 currently written, because it violates the Equal Protection Clause of the Fourteenth  
25 Amendment of the United States Constitution, incorporates improper criminal statute  
26 requirements, and violates the Indian and Child Welfare Act (ICWA). First, the Equal  
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1 Protections Clause provides that states shall treat all persons within its jurisdiction  
2 equally under the law. Where a law sets forth different standards based upon race,  
3 national origin or affects a fundamental right, the state must have a legitimate  
4 compelling interest for the disparate treatment and the legal classification must be  
5 absolutely necessary to accomplish that purpose. Here, the issue is the removal of a  
6 child from his or her biological parents or legal custodians. Regardless of a child's  
7 ethnicity, religious background, or national origin, the purpose is to protect children  
8 from imminent abuse or harm while also preventing unnecessary irreparable harm  
9 caused by seizing a child from his or her parents. To this end, every child, regardless of  
10 ethnicity, nationality, or religious affiliation, suffers trauma from being forcibly taken  
11 from his or her parents and every seizure interferes with the fundamental right to parent  
12 and the parent-child relationship. Thus, the same standard for the emergency removal of  
13 a child from his or her parent should apply to all children throughout Arizona.

17 Accordingly, the ICWA standards set forth in 25 C.F.R. § 23.113, to the extent  
18 they are more protective of children and provide a higher standard of care, should be  
19 applied equally to all of Arizona's children and parents. In fact, 25 C.F.R. § 23.113  
20 provides specific direction and requirements for emergency removal that must be  
21 followed in its totality. Among the procedural protections include the necessity of a  
22 specific finding that emergency removal "is necessary to prevent imminent physical  
23 damage or harm to the child". 25 C.F.R. § 23.113(b)(1). Therefore, this language must  
24 be used throughout the Proposed Rule 47.3, including (B)(1), (C)(1)(b), and (D)(1). *See*  
25 Appendix A. Further, 25 C.F.R. § 23.113(d)(1-10) lists information that must be  
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1 included in the actual request (called a “petition for a court order” under ICWA  
2 language) for emergency removal. Proposed Rule 47.3 language that allows for the  
3 information to be provided at a later date when the dependency petition is filed violates  
4 25 C.F.R. § 23.113(d)(1-10). *See* Proposed Rule 47.3(C). Thus, the proposed rule  
5 outlining the requisite information to be contained in the application to authorize the  
6 emergency removal of a child must comport with 25 C.F.R. § 23.113(d)(1-10). Several  
7 provisions of the Proposed Rule 47.3 attempt to incorporate ICWA standards but, as  
8 written, does not accurately convey the requirements of 25 C.F.R. § 23.113(d)(2-5, 8  
9 and 10). *See* Proposed Rule 47.3(C)(1)(c-d). For example, Section (C)(1)(c) of the  
10 Proposed Rule currently requires the applicant to explain the alleged facts of the family  
11 situation that has given rise to the request for the order. However, 25 C.F.R. §  
12 23.113(d)(8) mandates more than a brief summary of the family situation. It requires  
13 the applicant to describe the investigation efforts of the applicant and its agency, along  
14 with the alleged factual results of that investigation. Thus, ICWA requires the applicant  
15 to have actually investigated the situation rather than just providing a brief synopsis of  
16 the alleged family situation. *See* Appendix A. Likewise, Section (C)(1)(d) of the  
17 Proposed Rule appears to try to comply with 25 C.F.R. § 23.113(d)(10). But, Section  
18 (C)(1)(d) of the Proposed Rule simply asks the applicant to list out what services or  
19 remedial measures are *available*. This is drastically different than describing what  
20 *efforts were made to provide* those available services or remedial measures to the  
21 parents, as required in 25 C.F.R. § 23.113(d)(10). *See* Appendix A.

1           The proposed rule attempts to incorporate criminal standards regarding the time  
2 frame in which DCS or law enforcement may execute a warrant for emergency removal.

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4       - See Proposed Rule 47.3(C)(1)(g-h) and (D)(1)(e). The proposed language requires the  
5 applicant to specifically ask for permission to remove a child between the hours of  
6 10:00 p.m. and 6:30 a.m., provide the reasons for that request and requires the judicial  
7 official to find whether, for good cause shown, that request was granted. *Id.* However, if  
8 the removal of a child from his or her parent is necessary to the extent that DCS or law  
9 enforcement is asking for an emergency order and cannot wait for a hearing on the  
10 merits, then the removal should be necessary at any time of day or night. If DCS can  
11 wait to remove a child from his or her parents overnight, then there is no need for an  
12 emergency removal. Therefore, this language should be removed from the Proposed  
13 Rule. See Appendix A.  
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16           For all of the foregoing reasons, including those incorporated by reference to  
17 Appendix A, the Arizona Public Defender's Association respectfully requests the  
18 Proposed Rule 47.3 not be adopted as proposed by Mr. Byers. Instead, the APDA  
19 requests the Court adopt the language as proposed in Appendix A.  
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1 RESPECTFULLY SUBMITTED this 23th day of October, 2017.

2  
3 /s/ Christina Phillis

4 Christina Phillis

5 On behalf of APDA

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7 /s/ Sabrina Ayers-Fisher

8 Sabrina Ayers-Fisher

9 On behalf of APDA

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11 /s/ Suzanne Nicholls

12 Suzanne Nicholls

13 On behalf of APDA

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16 Electronic copy filed with the Clerk of e  
17 Supreme Court of Arizona this 23th day of  
18 October, 2017:

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20 By: cphillis

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## Appendix A



## Rule 47.3 Court Authorized Removal

**A. Purpose.** On application under oath by a child safety worker, a child welfare investigator, or a peace officer, the court will determine ex parte whether to authorize the applicant to enter premises to locate a child and to take emergency temporary custody of the child, including an Indian Child.

**B. Burden of Proof.** The applicant shall have the burden of stating explicit facts that provide probable cause to believe:

1. emergency temporary custody of the child is clearly necessary to ~~protect-prevent~~ imminent physical damage or harm to the child ~~from suffering abuse or neglect~~,<sup>1</sup>
2. no alternative means to effectively protect the child is available; and
3. remaining in the child's current home is contrary to the welfare of the child.

~~Additionally, for an Indian child, under 25 C.F.R. § 23.113(b)(1) the facts stated must provide probable cause that emergency temporary custody is necessary to prevent imminent physical damage or harm to the child.~~

## C. Procedure.

**1. Application.** A child safety worker, a child welfare investigator, or a peace officer may apply for authorization to enter premises to locate a child and to take emergency temporary custody of the child by submitting an application in writing or by recorded oral statement under oath to one of the judicial officers designated by the presiding judge of the superior court in Maricopa County to receive and respond to applications under this rule. The application or recorded oral statement must state:

- (a) the professional qualifications of the applicant,
- (b) the particular reasons each child is presently or imminently in danger of ~~abuse or neglect~~ physical damage or harm,<sup>2</sup>
- (c) a specific and detailed account of circumstances that led the applicant to request authority to take ~~require~~ emergency temporary custody, including what efforts were made to verify the facts that information support the reasons given,<sup>3</sup>
- (d) ~~the availability of remedial services or other voluntary options that would remove or control the danger~~ statement of efforts made to prevent the request for emergency temporary custody, including efforts to provide remedial services or other options that would alleviate the danger,<sup>4</sup>

<sup>1</sup> 25 § 23.113(a), (b)(1) & (d)

<sup>2</sup> 25 § 23.113(a), (b)(1) & (d)

<sup>3</sup> 25 § 23.113(d)(4) & (8)

<sup>4</sup> 25 § 23.113(d)(10)

1 (e) the identity and description of each child to be placed in emergency temporary  
2 custody,

3 (f) the place or places to be searched,

4 ~~(g) any time by which custody must be taken,~~

5 ~~(h) reason for any authorization needed to execute the order between ten p.m. and six-~~  
6 ~~thirty a.m., and~~

7 (g) residence and domicile of the child,<sup>5</sup>

8 (h) name and address of the child's parents, legal guardians and/or Indian custodian  
9 and a detailed explanation of the efforts made to locate and contact them,<sup>6</sup>

10 (i) steps taken to provide notice to the child's parents, legal guardians, Indian  
11 custodian and Tribe about the request for emergency temporary custody,<sup>7</sup>

12 (j) if there is reason to know the child is an Indian child, or if the child is believed to  
13 reside or be domiciled on a reservation where the Tribe exercises exclusive  
14 jurisdiction over child-custody matters, a statement providing any available  
15 information regarding the child's Tribe affiliation and what efforts have been made  
16 and are being made to contact the Tribe and transfer the child to the Tribe's  
17 jurisdiction,<sup>8</sup> and

18 ~~(ik)~~ whether law enforcement assistance is requested.

19 ~~Additionally, under 25 C.F.R. § 23.113(d), if there is reason to know the child is an~~  
20 ~~Indian child, the applicant should provide any available information regarding the~~  
21 ~~child's tribal affiliation, whether the child resides on a reservation and any efforts to~~  
22 ~~contact a tribe. The other information that should be provided under 25 C.F.R. §~~  
23 ~~23.113(d) may be provided in the dependency petition.~~

24 2. **Form.** The application must be submitted in a format approved by the  
25 Administrative Director of the Supreme Court.

26 3. **Evidence.** Evidence presented in support of an application for emergency  
27 temporary custody may include evidence which is reliable hearsay, in whole or in  
28 part.

4. **Consideration.** As soon as possible after receipt of an recorded oral statement  
under oath or a written application, a designated neutral and detached judicial officer  
will consider the application ex parte. The judicial officer may question the applicant  
and any witnesses orally or in writing. Any oral questioning or consideration must be

<sup>5</sup> 25 § 23.113(d)(5)

<sup>6</sup> 25 § 23.113(d)(2) & (4)

<sup>7</sup> 25 § 23.113(d)(3)

<sup>8</sup> 25 § 23.113(d)(6-7) & (9)

recorded. The judicial officer who considers the request, regardless of whether an order for emergency removal issues, shall not later serve in any capacity over the parents, legal guardians or Indian custodians involving this subject matter.

#### D. Findings and Order.

1. **Content.** The order will state whether there is probable cause to believe that emergency temporary custody of the child is clearly necessary to prevent ~~abuse or neglect~~the imminent physical damage or harm to the child<sup>9</sup> because no alternative means to effectively protect the child is available and whether remaining in the child's current home is contrary to the welfare of the child. Additionally, an order granting an application must include:

(a) a finding that removal and emergency temporary custody is necessary to prevent imminent physical damage or harm to the child,<sup>10</sup>

(b) a factual basis for the determination for each child,

~~(c)~~ the identity and description ~~with reasonable particularity~~ of each child to be placed in emergency temporary custody,

~~(d)~~ the identity and description of ~~one~~the location to be searched, with reasonable particularity, with separate orders to issue for each ~~order~~location to be searched, and

(d) whether law enforcement is authorized to assist, ~~and~~

~~(e) whether for good cause shown the authorization includes searching for the child and taking custody at any hour.~~

~~Additionally, for an Indian child, under 25 C.F.R. § 23.113(b)(1) the court must find probable cause that emergency temporary custody is necessary to prevent imminent physical damage or harm to the child. A separate order must be issued for each location to be searched.~~

2. **Form.** If the applicant and judicial officer are not in each other's physical presence, the judge may sign the order authorizing emergency temporary custody using an electronic signature to serve as the original order, orally authorize the applicant to sign the judge's name on the order, or sign an electronically transmitted version of the original order which is then deemed to be the original. Any oral authorization to sign on behalf of the judge must be audibly recorded. In addition, ~~The~~ the judicial officer will record the time and date of issuance of an orally authorized order on the original order and the applicant will send the duplicate original order to the judicial officer who

<sup>9</sup> 25 § 23.113(a), (b)(1) & (d)  
<sup>10</sup> 25 § 23.113(b)(1)

1 issued the order who will then file these orders in the court that would have  
2 dependency jurisdiction of the child.

3 **3. Notice.** The applicant must provide the parent or other custodian a copy of the  
4 emergency temporary custody application and order authorizing emergency temporary  
5 custody with the Temporary Custody Notice (TCN) upon taking custody of the child  
or, when a parent is not present, as soon thereafter as reasonably possible.

6 **4. Execution and Duration.** The applicant may execute the order until there is a  
7 material change in the factual basis for the probable cause determination and within  
8 ten calendar days of issuance of the removal order. However, any emergency removal  
9 of a child must terminate immediately when the removal is no longer necessary to  
10 prevent imminent physical damage or harm to the child.<sup>11</sup> The applicant must provide  
11 notice of the execution of the order to the court that issued the order. The temporary  
12 custody authorized by the order will expire after 72 hours excluding Saturdays,  
13 Sundays and holidays unless a dependency petition is filed. The court with  
14 dependency jurisdiction over the child will review continuation of temporary custody  
15 as provided in Rules 50 and 51.

16 **5. Filing:** The applicant must file the application and order when the TCN and the  
17 dependency petition are filed. Prior to filing the application and order the applicant  
18 must indicate on the order whether the child was removed as authorized by the order.  
19 If no petition is filed following an order authorizing emergency temporary custody  
20 under this rule the applicant must file the application and order within 72 hours  
21 excluding Saturdays, Sundays and holidays in the court that would have dependency  
22 jurisdiction of the child.

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<sup>11</sup> 25 § 23.113(a)